

**NLWJC-2006-0197-F ( seg 3) Kagan**

**Folder: Tobacco – Settlement - Indians**

# FOIA MARKER

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**Collection/Record Group:** Clinton Presidential Records

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**OA/ID Number:** 14367

**FolderID:**

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**Folder Title:**

Tobacco-Settlement-Indians

**Stack:**

**S**

**Row:**

**97**

**Section:**

**3**

**Shelf:**

**10**

**Position:**

**1**

## THE GORTON AMENDMENT

**Q: What does the Gorton Amendment do?**

**A:** The Gorton Amendment modifies Section 604 of the McCain bill to require Indian tribes and tribal corporations to collect state taxes on sales of tobacco products to non-members of the tribe or corporation and then remit those taxes to the federal government, which then must return those funds to the states.

**Q: Can the states tax sales of tobacco products on Indian lands?**

**A:** Since the formation of the Union, the United State has recognized Indian tribes as "domestic dependent nations" that exercise governmental authority over their members and their territory. The Constitution vests the federal government with authority over relations with Indian tribes. Because Indian tribes and Indians are governed by tribal and federal law, states have no authority to tax Indian tribes, Indians, or Indian property on Indian lands in the absence of express congressional authorization. States may tax non-Indians who buy pre-packaged goods that have been brought onto Indian lands for resale, but may not tax sales to non-Indians when the value of the goods are generated on the reservation.

**Q: How does the Gorton Amendment interfere with tribal sovereignty?**

**A:** Where Indians manufacture tobacco products on their own lands, state taxes on reservation-generated tobacco products would normally be pre-empted under the tribal self-determination doctrine; the Gorton Amendment interferes with this fundamental principle. Even with respect to state taxes collected on sales of pre-packaged goods to non-Indians, the Gorton Amendment violates traditional principles of comity and federalism, which demand that state-tribal relations be developed based on dialogue and cooperation between states and tribes. The Gorton Amendment, by imposing a federally mandated tax collection scheme to replace the cooperative agreements currently used by states and Indian tribes, violates these principles. Some of these state-tribal agreements are authorized pursuant to state statute.

**Q: Why is the Gorton Amendment burdensome?**

**A:** The Gorton amendment establishes a complex scheme to address a problem that states and Indian tribes have already resolved. Dual tribal and state taxation of prepackaged goods sold to non-Indians is possible, but many states have agreed that it is not preferable. To that end, eighteen states have entered into state-tribal tax agreement with numerous Indian tribes. These agreements ensure that a single tax is imposed, provide a stable tax framework, and ease tax administration significantly. There appear to be over 200 existing state-tribal tax agreements in these 18 states.

By unilaterally requiring Indian tribes to collect the state taxes and also adding the federal government as an intermediary, the Gorton Amendment enormously increases the burden of collecting taxes, without any benefit to the states or the Indian tribes. Federal accounting, oversight, and administrative costs will increase to implement this new legislative scheme. However, nothing more than anecdotal evidence has been presented to support this overreaching legislative mandate.

**Q: Has the administration taken this position previously?**

**A:** Yes, most recently before the Senate Committee on Indian Affairs in a hearing on tribal sovereign immunity on March 11, 1998. In the administration's view, agreements are the best mechanisms for mutually satisfactory resolution of tax collection issues between states and tribes. Even if states and tribes are unable to reach agreement, however, states may impose their taxes at the wholesale level to collect taxes on goods that are destined for sale to non-Indians. Moreover, reliance on agreements preserves tribal governmental authority and sovereignty.

**Q: What should the McCain bill do about Indian tribes and state taxes?**

**A:** As originally drafted, the McCain bill did not disturb the current system, which has worked for both the tribes and the states. It permitted the states and the tribes to work together to collect the state's revenues and to share revenues if they so desire. Moreover, it vindicated the federal government's trust responsibility to Indian tribes and recognized their status as domestic dependent nations.

1/5 cc  
to Elena -  
returning  
me for noty.

Tob - sur - Indians

## **WHY THE SENATE SHOULD VOTE TO STRIKE SECTION 604 OF THE TOBACCO BILL**

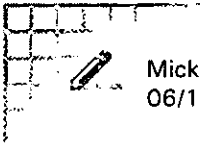
Section 604 of S. 1415 is a revenue provision that would create a *Federal* tax collection and distribution mechanism for the payment and collection of *State* taxes by *Tribal* governments. It would require Indian Tribes to collect and remit to the U.S. Treasury all excise and sales taxes imposed by the State within which the sale of any tobacco products occurs—whether or not the sale takes place on or off the Tribe's reservation (or other Indian land). The Treasury Department would then be required to remit these taxes back to the State within which they were collected.

The National Congress of American Indians opposes this provision because:

- Section 604 would preempt and undermine state-tribal compacts to the detriment of Indian communities. These compacts are employed by at least 18 states to provide for the collection of taxes on sales involving non-members. The treatment of state and local taxes on Indian lands has been effectively handled at the tribal-state level for many years because states have adequate remedies for collecting the tax. More than 200 Tribes in 18 states have created successful state-tribal compacts that are now in force and are mutually satisfactory to both parties. These compacts provide a tax base for the tribal governments of the most impoverished communities in the United States. A fundamental principle of sound Federal policymaking is to avoid Federal intrusion whenever local parties are already reaching agreement.
- Section 604 would unfairly single out Indian Tribal governments under the guise of "eliminating pricing disparities" while ignoring the fact that such price disparities will continue to exist between States. Cigarette taxes imposed by the District of Columbia equal 65 cents per pack; across the Potomac in Virginia, such taxes range from 2.5 cents to 37.5 cents (depending on the locality). S. 1415 would not address such interstate price disparities in the same heavy-handed way that it proposes to do for tribal-state disparities.
- Section 604 would impose an unfunded mandate on Indian Tribal governments, in express violation of the terms of the Unfunded Mandates Reform Act of 1995. The Unfunded Mandates Act was enacted to discourage the imposition of expensive federal mandates on state, local and tribal governments. This provision would impose administrative costs on tribal governments by forcing them to collect state taxes on certain tobacco sales.
- Section 604 would effectively impose new and unprecedented duties on the U.S. Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF). At a time when the BATF is struggling to meet its federal tax collection and law enforcement obligations, Section 604 would add new unfunded responsibilities.

For more information, please contact the NCAI at 202-466-7767.

CLINTON LIBRARY PHOTOCOPY



Mickey Ibarra  
06/10/98 01:30:06 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Lynn G. Cutler/WHO/EOP

Subject: Indian Country

Mary Smith sent a draft letter to you for clearance addressed to Sen. McCain regarding the concern involving Indian tribal sovereignty and the collection of state taxes. Would you please give me a status report. ~~Lynn Cutler and I are meeting with a number of Tribal chairs and others at 1pm tomorrow (you, and Sylvia have been invited) and we will certainly be asked for our support to prevent any real or perceived erosion of tribal sovereignty. IGA feels strongly that we need to lay down an early marker that once again the President is on the side of the Native American Community on this issue. Thanks.~~

May 18, 1998

Dear Senator McCain,

I support your efforts in helping to pass comprehensive tobacco legislation which dramatically reduces youth smoking and to remove Section 604 which requires Indian tribes to collect state taxes on sales of tobacco products.

Since the formation of the Union, the United State has recognized Indian tribes as "domestic dependent nations" that exercise governmental authority over their members and their territory. Where Indians manufacture tobacco products on their own lands, state taxes on reservation-generated tobacco products would normally be pre-empted under the tribal self-determination doctrine; Section 604, as currently drafted, interferes with this fundamental principle. Even with respect to state taxes collected on sales of pre-packaged goods to non-Indians, Section 604 violates traditional principles of comity and federalism, which demand that state-tribal relations be developed based on dialogue and cooperation between states and tribes.

Section 604 establishes a complex scheme to address a problem that many states and Indian tribes have already resolved. At least eighteen states have entered into state-tribal tax agreement with numerous Indian tribes. These agreements ensure that a single tax is imposed, provide a stable tax framework, and ease tax administration significantly. By unilaterally requiring Indian tribes to collect the state taxes and also adding the federal government as an intermediary, Section 604 enormously increases the burden of collecting taxes, without any benefit to the states or the Indian tribes. Federal accounting, oversight, and administrative costs will increase to implement this new legislative scheme.

Agreements are the best mechanisms for mutually satisfactory resolution of tax collection issues between states and tribes. Even if states and tribes are unable to reach agreement, however, states may impose their taxes at the wholesale level to collect taxes on goods that are destined for sale to non-Indians.

As originally drafted, the McCain bill did not disturb the current system, which has worked for both the tribes and the states. It permitted the states and the tribes to work together to collect the state's revenues and to share revenues if they so desire. Moreover, it vindicated the federal government's trust responsibility to Indian tribes and recognized their status as domestic dependent nations.

I hope that you will continue to work to remove Section 604, as currently drafted, from the legislation. Thank you for your important work in this area.

JOSHUA  
GOTBAUM

06/23/98 10:40:53 PM



Record Type: Non-Record

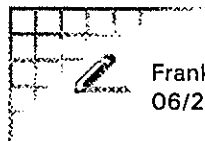
To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP  
cc: See the distribution list at the bottom of this message  
bcc:  
Subject: Re: "\$38,000 per Native American"

Senator Gramm's completely fraudulent pseudo-statistic was created by:

1. taking the \$300 million per year that might be spent on Indian health services for smoking related health activities (e.g., heart disease, cancer, etc.) and assuming it is all for cessation;
2. taking the 25-year total (\$7.6B); and
3. pretending it would all be spent at once for the estimated 29% of current Native Americans who smoke.

This is a little like saying that the taxpayers are paying Senator Gramm \$3,625,000.00 -- his salary over the next 25 years -- to make one speech on the evils of cigarette taxes.

Frank J. Seidl III



Frank J. Seidl III  
06/23/98 06:19:02 PM

Record Type: Record

To: Cynthia Dailard/OPD/EOP@EOP  
cc: See the distribution list at the bottom of this message  
Subject: Re: Native Americans

Per your request, we have searched the Congressional Record to see if we could find Sen. Nickles talking about \$38,000 per Native American. We could not find either Lott or Nickles quoting this figure, but we did find the statement below from Sen. Gramm on June 9, 1998, which states that the bill will provide \$18,615 per Native American adult smoker and \$37,231 per every family containing two adult smoker.

Excerpt from Gramm's Floor Statement , June 9, 1998:

I have a new one today, and what I thought I would do is begin to do a new one each day that we do this bill. My new one today is on Native American smokers cessation.




We have a provision tucked away in this bill, one of dozens and dozens of provisions, where we are going to provide up to \$7.56 billion for smoker cessation programs among Native Americans. These bills will be targeted at the 1.4 million Native Americans served by the Indian Health Service. Adult Native Americans smoke at a higher rate than the population as a whole--39.2 percent. We will be spending \$18,615.55 per adult Native American smoker in this program. If you have a family in which both adults smoke, we will be spending on their smoker cessation programs under this bill--now, hold your hat on this--\$37,231.10 for every Native American family who smokes, \$37,231.10.

Now, we could buy people a Chevrolet Suburban. We could buy every smoking Native American family a Suburban for what this program will cost on a per capita basis for smokers.

Now, does anybody believe that when we are talking about one little provision--and I could make this point about dozens of other programs, and I will as we go further along the debate--but does anybody believe this bill is seriously 'scrubbed' for how we are spending money, when we are spending \$37,231.10 per smoking Native American family on cessation? Does anybody view that as anything other than what a candidate for State office in my State called this whole process when he said, 'We won the lottery.'

Message Copied To:

cynthia dailard/opd/eop  
jim r. esquea/omb/eop  
richard j. turman/omb/eop  
melany nakagiri/omb/eop  
lourdes m. lamela/omb/eop  
marc garufi/omb/eop  
barbara a. menard/omb/eop  
Frank J. Seidl III/OMB/EOP

 Mary L. Smith  
05/04/98 02:50:43 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Thomas L. Freedman/OPD/EOP


cc: Laura Emmett/WHO/EOP

Subject: Administration position on Gorton amendment



TOBGORT.W Interior called me again so that they could follow up with Monyihan's office on our position on the Gorton amendment. The agencies had prepared a q&a on the Gorton amendment, which answers most of the questions. Attached is a copy. The Administration has most recently taken a position against this type of legislation in DOJ hearing testimony on March 11, 1998. Please let me know if Interior can get back to Monyihan's office. Thanks, Mary

----- Forwarded by Mary L. Smith/OPD/EOP on 05/04/98 02:51 PM -----

 Mary L. Smith  
04/29/98 09:08:01 AM

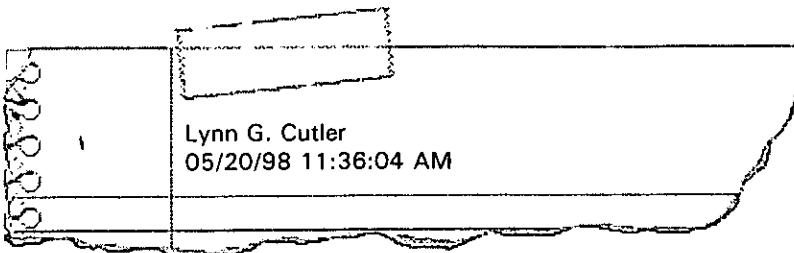
Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP

Subject: Administration position on Gorton amendment

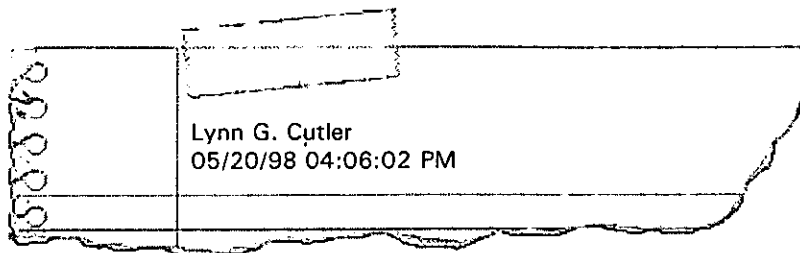
Senator Monyihan's office has called the Department of Interior asking what the Administration's position is with respect to the Gorton amendment, which requires Indian tribes to collect state taxes on the sale of tobacco products to non Indians. There doesn't seem to be any debate over our position-- the Department of Justice recently testified in March of this year that we don't favor this type of legislation because it interferes with tribal sovereignty. Let me know if it is alright if Interior calls Monyihan's office back.



Record Type: Record

To: Cynthia A. Rice/OPD/EOP, Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP  
cc: Carole A. Parmelee/WHO/EOP, Mary L. Smith/OPD/EOP, Mickey Ibarra/WHO/EOP  
Subject: tobacco letter

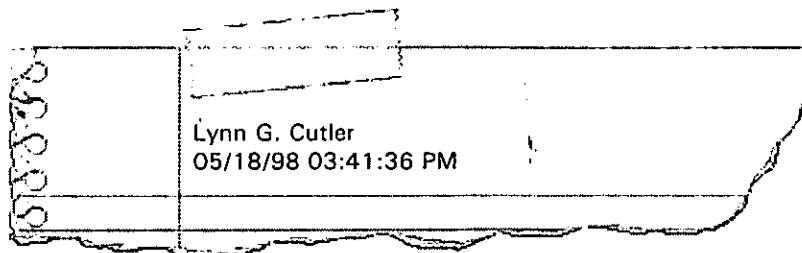
the version I saw last night had a reference to the amendments (offered by Sen. Gorton) that are very problematic for Indian country. I have had many calls on this--it is Gorton's way of attacking sovereignty. Some of the tribes are trying to work on a price parity compromise, but it is not good for this President to appear in any way condoning what the Gorton taxation amendment provides. I would hope that the line that was in the letter last night could be restored.



Record Type: Record

To: Cynthia A. Rice/OPD/EOP, Elena Kagan/OPD/EOP, Bruce N. Reed/OPD/EOP  
cc: Carole A. Parmelee/WHO/EOP, Mickey Ibarra/WHO/EOP  
Subject: what else

I've learned (and am sure you knew this) that Sen. McCain is strongly opposed to the Gorton amendments, but that he didn't have the votes to strike in conference. He is signing on to the Campbell amendment to strike Gorton, and as of now, there are 51 Senators who have no idea how they'll vote on this amendment. Gorton is so complicated and so bad for Indian country, that some signal from us or from Interior will be very important so that our friends know where we stand on this. It is also very important to be able to tell Indian country that we took a stand on this. I feel that the President would want to send this signal--the language in the letter of last night was very mild.

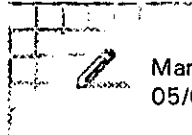


Record Type: Record

To: John Podesta/WHO/EOP, Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Mickey Ibarra/WHO/EOP  
cc: Mary L. Smith/OPD/EOP, Mona G. Mohib/WHO/EOP  
Subject: tobacco bill and Indian country

I'm hearing from tribes that they are very worried that the Administration is not hanging in on the tobacco bill for them. I've explained that I've been told that the McCain bill will have them included, and there undoubtedly will be a floor fight. They are concerned that we will not stand with them to keep them independent of state decisions. Can anyone help me?

Tob-sec-Indians



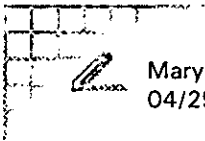
Mary L. Smith  
05/06/98 06:25:12 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP, Cynthia Dailard/OPD/EOP, Elena Kagan/OPD/EOP  
cc: Laura Emmett/WHO/EOP  
Subject: Native American Public Health Provisions in McCain Bill

The Indian Health Service has received inquiries from McCain's, Inouye's, and Conrad's staffs regarding our position on the Native American provisions in the McCain bill related to public health (not to the Gorton amendment). We had some staff level policy changes (which we haven't sent in yet), but with those changes, HHS, DOJ, OMB, and Interior were all fine with the provisions in the McCain bill.

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Mary L. Smith  
04/29/98 09:08:01 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP  
cc: Cynthia A. Rice/OPD/EOP  
Subject: Administration position on Gorton amendment

Senator Monyihan's office has called the Department of Interior asking what the Administration's position is with respect to the Gorton amendment, which requires Indian tribes to collect state taxes on the sale of tobacco products to non Indians. There doesn't seem to be any debate over our position-- the Department of Justice recently testified in March of this year that we don't favor this type of legislation because it interferes with tribal sovereignty. Let me know if it is alright if Interior calls Monyihan's office back.

*Seems okay to me.*

Date: 04/06/98 Time: 17:07

TTobacco bill would force Indians to collect taxes

WASHINGTON (AP) Indian tribes would have to begin collecting state taxes on tobacco sales to nonmembers under a provision in the Senate's leading tobacco bill.

The measure is designed to end the days of reservation smoke shops being a source of cheap cigarettes. States claim they're losing hundreds of millions of dollars a year through tax-exempt sales of cigarettes and motor fuels on reservations.

The Supreme Court ruled 18 years ago that tribes had to collect taxes on sales to nonmembers. But states have little power to enforce that since tribes are immune from their lawsuits.

"What is the purpose of comprehensive tobacco legislation and raising the price of cigarettes if Indian tribes will still be able to undercut prices in other parts of a state?" asked Sen. Slade Gorton, R-Wash.

In Gorton's home state, smokers can save 83 cents a pack by buying cigarettes on a reservation.

The provision, approved by the Senate Commerce Committee on a 10-9 vote last week and awaiting action in the Senate, would require tribes to collect state cigarette taxes and turn the money over to the Treasury Department for distribution to the states.

Some tribes have reached agreements with states to remit the taxes in exchange for a share of the revenue. All of Minnesota's tribes, for example, have negotiated collection agreements. But officials in other states say that they have little bargaining power with the tribes.

The provision in the tobacco bill would "put us on a little more equal footing," North Dakota Tax Commissioner Rick Clayburgh said Monday.

Estimates of lost taxes vary widely by state. New York estimates it loses \$65 million a year, Washington \$63 million, California \$30 million to \$50 million annually, and Oklahoma \$27 million.

In South Dakota, which has tax agreements with five of seven tribes, the loss is estimated at \$129,000 a year. North Dakota officials don't know what they are losing.

Tribes contend the problem is overblown and are certain to fight the collection requirement as the tobacco bill makes its way through Congress.

"Those revenues go out of the reservation communities into state coffers and never come back," said Ron Allen, president of the National Congress of American Indians. "The state has an obligation to these communities yet they have never made any meaningful contribution to those tribes."

States would have little incentive to negotiate future revenue-sharing pacts if tribes are forced to collect the taxes, he said. States "can absolutely dictate," he said.

The provision surfaced so quickly as the Senate Commerce Committee was working on the tobacco legislation last week that senators who support the tribes' provision did not have time to organize opposition, Allen said.

Gorton has long sought to limit the power of tribal governments, going back to his days as state attorney general in Washington. He represented the state in the 1980 case that produced the Supreme Court ruling that said tribes had to collect taxes from nonmembers.

In 1991, the court ruled that the doctrine of sovereign immunity bars states from suing tribes to collect taxes.

APNP-04-06-98 1706EDT

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Total Pages: 7

LRM ID: RJP194

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

Wednesday, February 11, 1998

## LEGISLATIVE REFERRAL MEMORANDUM

**TO:** Legislative Liaison Officer ; See Distribution below

**FROM:** Janet R. Forsgren (for) Assistant Director for Legislative Reference  
*Robert J. Pellicci*

**OMB CONTACT:** Robert J. Pellicci  
PHONE: (202)395-4871 FAX: (202)395-6148

**SUBJECT:** HHS Testimony on the Tribal Provisions Contained in Proposed Tobacco Legislation

**DEADLINE:** \* 1:00 p.m. Wednesday, February 11, 1998 \*

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

**COMMENTS:** Hearing is before the Senate Committee on Indian Affairs tomorrow February 12th.  
**YOUR EXPEDITED REVIEW IS REQUIRED.**

DISTRIBUTION LISTAGENCIES:

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**DRAFT**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**STATEMENT**

**OF**

**W. CRAIG VANDERWAGEN, MD  
DIRECTOR, CLINICAL AND PREVENTIVE SERVICES  
OFFICE OF PUBLIC HEALTH  
INDIAN HEALTH SERVICE**

**BEFORE THE**

**SENATE INDIAN AFFAIRS COMMITTEE**

**FEBRUARY 12, 1998**

**STATEMENT OF THE INDIAN HEALTH SERVICE ON THE TRIBAL PROVISIONS  
CONTAINED IN PROPOSED TOBACCO LEGISLATION  
BEFORE  
THE SENATE INDIAN AFFAIRS COMMITTEE**

Good Morning: Mr. Chairman and Members of the Committee:

I am Dr. W. Craig Vanderwagen, Director, Division of Clinical and Preventive Services, Indian Health Service (IHS). The IHS is an agency of the Public Health Service (PHS) within the Department of Health and Human Services. The IHS is responsible for providing health services to members of Federally recognized American Indian and Alaska Native (AI/AN) tribes and also has limited authority and funding to provide services to urban populations of American Indians and Alaska Natives. The provision of these services is based on a special relationship between Indian Tribes and the U.S. Government and is defined by Constitutional provisions, executive orders, treaties, and a broad range of laws and judicial decisions.

**IHS MISSION**

The IHS goal is to raise the health status of AI/ANs to the highest possible level. The mission is to provide a comprehensive health services delivery system for AI/ANs with opportunity for maximum Tribal involvement in developing and managing programs to meet their health needs. I am pleased to be here today to further discuss the issue of tobacco related health concerns since there are significant impacts of tobacco use among the people we serve. We commend the Committee leadership's commitment to address the many issues related to tobacco usage among American Indians and Alaska Natives. As the primary agency responsible for the provision of health care to Indian people, we are particularly appreciative of your interest in making certain that Indian tribes are considered in any benefits that result from legislation related to the regulation of the tobacco industry.

## **PREVALENCE OF TOBACCO USE**

Studies conducted by the IHS reveal that tobacco use is a common health risk factor. A study by the staff of the IHS Cancer Prevention and Treatment Program revealed that 10 percent of all deaths in AI/ANs are related to cigarette smoking or use of other tobacco products. This translates to well over \$200 million in health expenditures by IHS to provide care for tobacco related illness. But the frequency of tobacco related disease has great geographic variability.

Using the Behavioral Risk Factor Surveillance System Surveys (BRFSS), Sugarman, et al compared tobacco use among American Indians (AI) in the 36 states participating during the years 1985 through 1988 (Alaska did not participate in the BRFSS during this time period). These states were divided into four geographic regions: the Southwest, the Plains, the West Coast and Other States. The populations served by IHS were studied to assess regional differences in use of tobacco products.

The prevalence of current cigarette smoking varied by geographic region more than twofold for AI Men and more than fourfold for AI women. For example, in Southwest States, 18.1 percent of Indian males and 14.7 percent of Indian females reported current smoking compared to the Plains States where 48.4 percent of Indian males and 57.3 percent of Indian females reported current smoking. Cigarette smoking is one factor in which regional differences among Indians were markedly different from those among whites, as the prevalence of current smoking reported by white respondents varied relatively little by geographic region.

Variability of tobacco use by different regions was also documented in the IHS Oral Health Monitoring System in 1991. In this survey, each AI/AN patient who was provided care in the IHS dental clinic (above age 5) was asked if he or she used any form of tobacco products routinely (other than for culturally/religiously determined events). The findings revealed a great deal of age and geographic variability. For example, 9 percent of 5-19 year olds reported tobacco use, but 39 percent of 20-34 year olds admitted routine use. Geographic variability was also extreme with Albuquerque, Phoenix, and Navajo reporting tobacco use in less than 30 percent of

the adult population. By contrast, Aberdeen, Alaska, Billings, and Bemidji reported in excess of 50 percent of adults routinely using tobacco.

The IHS has also analyzed the use of smokeless tobacco. These studies revealed that use of smokeless tobacco products has regional variability that mirrors the smoking trends. More distressing is the finding that young people from age 15-24 are using these products in significant numbers. There appears to be an especially high frequency of use among American Indians who participate in rodeos. This association with rodeo activities is currently being studied by an American Indian medical student who has received a grant to analyze the marketing of smokeless tobacco products to rodeo participants and American Indian participants in particular.

The significance of these findings is reflected in the diseases associated with tobacco use. Lung cancer was the leading cause of cancer mortality for all IHS areas combined (1984-1988). The trend has continued and in the next publication of "Cancer Mortality among Native Americans in the United States," lung cancer is still the leading cause of cancer mortality for the years 1989-1993. In Alaska, lung cancer is the leading cause of cancer related deaths among women in contrast with the rest of the IHS service population where reproductive cancers are the challenge in cancer prevention and treatment. Chronic obstructive pulmonary disease (COPD) also is a significant health problem in those regions where smoking is prevalent.

#### **Current Activities to Treat and Prevent Tobacco Abuse**

The IHS has undertaken a number of activities to treat patients with an addiction to tobacco products. This has included modifying materials from the American Cancer Society and the American Lung Association to make them more culturally relevant. These materials are being used by primary providers and also by Community Health Representatives to provide smoking cessation training and support. The success rate of cessation programs in AI/AN communities does not appear to differ from the rate in the general U.S. population.

Primary prevention efforts have been the major emphasis of the IHS and tribal organizations.

The Northwest Portland Indian Health Board for example has developed a model Clean Indoor Air Policy which it is disseminating to tribal governments. The IHS has developed model policies for reducing youth access to tobacco products. Our agency is distributing this information for use by tribal governments in developing approaches to limiting youth access. Other materials have been developed by tribes and IHS to promote and support drug free rodeos, powwows, and other cultural events.

Lastly, state governments and state based organizations have increasingly included American Indian and Alaska Native tribes and organizations in their tobacco related activities. The Alaska Native Health Board working with others in Alaska were able to promote a tax increase on tobacco products which has provided additional funds for educational efforts in the state. California and Arizona have also been states where program initiatives have been developed to include American Indian concerns and populations specifically.

In summary, tobacco use is a significant health issue in American Indian and Alaska Native communities. American Indians and Alaska Natives have the highest smoking rate of any racial sub-population. The IHS and its tribal and urban partners have committed themselves to treatment and prevention aimed at reducing the health impact. The principles articulated by Secretary Shalala in her recent testimony on the tobacco settlement are applicable to the needs of the population we serve. We will work under her direction and in consultation with our partners to continue to address these health needs.

Mr. Chairman, this conclude my prepared statement. I will be happy to answer any questions that you may have.

Tobacco settlement -  
Indian affairs

Total Pages: \_\_\_\_\_

LRM ID: AMB271

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

Tuesday, February 10, 1998

## LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below  
FROM: Ronald K. Peterson (for) Assistant Director for Legislative Reference  
OMB CONTACT: Anna M. Briatico  
PHONE: (202)395-7301 FAX: (202)395-5691  
SUBJECT: JUSTICE Testimony on Attorney General and Tobacco Industry Report on Tobacco Settlement Plan

DEADLINE: 10 a.m. Wednesday, February 11, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The draft testimony is for a February 12th hearing before the Senate Committee on Indian Affairs. Thomas LeClairo is the Justice Department witness.

If we do not hear from you by the deadline, we will assume that you have no comments.

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**TESTIMONY ON THE TRIBAL GOVERNMENT PROVISIONS  
OF PROPOSED TOBACCO LEGISLATION  
Before the Senate Indian Affairs Committee  
February 12, 1998**

Chairman Nighthorse Campbell, Vice Chairman Inouye, and Members of the Committee, good morning and thank you for inviting the Department of Justice to testify today. I am Thomas LeClaire, Director of the Office of Tribal Justice, Department of Justice.

At the outset, I should emphasize that I am here today to briefly discuss our preliminary views on Federal Indian law and policy as it relates to various legislative proposals concerning the marketing, sale, and regulation of tobacco. The views that I express today are limited to Federal Indian law and policy issues, and are not intended to set forth a general Administration policy position on the proposed tobacco legislation.

**THE FEDERAL TRUST RESPONSIBILITY AND GOVERNMENT-TO-GOVERNMENT  
RELATIONS WITH INDIAN NATIONS**

When working with Indian nations it is important to bear in mind the fundamental principles that guide the Federal Government's relations with Indian tribes and nations.

The United States has a unique legal relationship with Indian tribes as set forth in the Constitution, treaties, statutes, court decisions, executive orders, and administrative action. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. E.g., Treaty with the Delaware Nation, 1778, 7 Stat. 13; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). In

hundreds of treaties and agreements, our Nation guaranteed the right of Indian tribes to the "highest and best" form of government -- self-government. Ex Parte Crow Dog, 109 U.S. 556, 568-69 (1883).

Congress has acknowledged that "the United States has a trust responsibility to [Indian tribes] that includes the protection of the sovereignty of each tribal government." See e.g., 25 U.S.C. § 3601(2); see also 25 U.S.C. §§ 450, 1451, 1601, 2501-2502, 3701, and 4101. Under our Federal trust responsibility to protect Indian nations, the United States should exercise the highest standard of care concerning tribal government authority.

The Administration and the Attorney General respect and honor the commitments of the United States to Indian nations. Thus, both Congress and the Executive Branch have recognized the importance of working with Indian nations on issues concerning tribal government, trust resources, and Indian treaty rights within the framework of government-to-government relations. We respectfully submit that any legislation in this area relating to tribal governments should be consistent with Federal government-to-government relations with Indian nations and the status of Indian tribes as domestic nations under the protection of the United States.

#### DEFINITIONS

In any legislative proposals, we believe that the term "Indian tribe" should be defined either by reference to the

definition set forth in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b, or the Federally Recognized Indian Tribe List Act, 25 U.S.C. § 479a. Reporting on the Federally Recognized Indian Tribe List Act, the House Committee on Resources emphasized the importance of federal recognition to Indian tribes:

[Federal recognition is a] formal political act[;] it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe, and its members.

H.R. Rep. 103-781, 103rd Cong., 2nd Sess. (1994) at 2; 1994 U.S.C.C.A.N. 3768, 3769.

If the terms "American Indian" and "Alaska Native" are used, we recommend that those terms be defined by reference to the term "Indian" under 25 U.S.C. § 450(d), which is based on tribal membership in a federally recognized Indian tribe. Morton v. Mancari, 417 U.S. 535 (1974) (tribal membership is a "political status" related to the status of Indian tribes as governments).

#### TRIBAL REGULATORY AUTHORITY

As domestic dependent nations, Indian tribes are distinct, self-governing political communities that possess governmental authority over their members and their territory. Merrion v. Jicarilla Apache Tribe, 450 U.S. 130, 141 (1982). Indian tribes have plenary authority over Indians, see 25 U.S.C. § 1302 (Indian tribes possess criminal jurisdiction over all Indians within tribal territory), and possess civil authority over the conduct of non-Indians, who enter tribal lands or engage in commercial

relations with the tribe or its members. Kerr McGee v. Navajo Nation, 471 U.S. 195 (1985); Montana v. United States, 450 U.S. 544 (1981).<sup>1</sup>

Accordingly, if tobacco legislation is enacted to establish minimum federal law requirements for the manufacture, marketing, distribution, and sale of cigarettes, Indian tribes should have the opportunity to establish tribal law requirements for Indian country consistent with the federal minimum standards. 18 U.S.C. § 1151 (Indian country defined). Tribal legislative authority should not be limited by state law requirements, and state law requirements should not be incorporated by reference in Indian country because Indian peoples have "the right to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217 (1959).

Consistent with the Federal Indian Self-Determination Policy, legislation should provide tribal government institutions with the opportunity to enforce federal and tribal law requirements relating to tobacco within Indian country. Some of the smaller tribes may not have the regulatory infrastructure in place to enforce tobacco regulatory laws at this time, so tobacco legislation might include some type of federal certification process by the Secretary of the Interior (or Agriculture) to determine whether an Indian tribe has the governmental

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<sup>1</sup> An Indian tribe may also retain civil authority over the activities of non-Indians on non-Indian lands within its reservation, if the activities threaten the tribe's political integrity, economic security, or health and welfare. Montana v. United States, *supra*.

infrastructure necessary to enforce the laws.<sup>2</sup> If the Secretary makes the requisite certification, then the Indian tribe should be recognized as the frontline authority for tobacco regulation in Indian country.

If the Secretary does not make the necessary certification, the Food and Drug Administration (or other federal agency) should be authorized to enforce federal tobacco laws in the applicant tribe's Indian country. An Indian tribe should have an opportunity to reapply for the necessary federal certification, so that it may perform tobacco regulatory functions when its tribal government institutions become capable of doing so.

Finally, even where Indian tribes are certified as capable of enforcing federal and tribal tobacco regulatory laws, the Federal Government should retain concurrent authority to enforce federal law. (States should not be delegated federal regulatory authority in Indian country in the absence of tribal consent because that would infringe on tribal self-government. Cf. 25 U.S.C. § 1326 (Indian people must, by referendum, approve any extension of state authority in Indian country under Public Law 280); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) (tribal governments are not

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<sup>2</sup> This certification process should focus on tribal governmental infrastructure, and not a comparison to state and local governments, because Indian tribes have distinct tribal government institutions based on their own unique histories.

dependent on, or subordinate to, the States).<sup>3)</sup>

#### RESERVATION GENERATED VALUE

Based on the United States' recognition of tribal rights to self-government, Indian tribes and reservation Indians generally are exempt from state regulation and taxation in Indian country. See U.S., California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (regulation); Moe v. Salish & Kootenai, 425 U.S. 463 (1974) (taxation). In addition, when Indian tribes and Indians generate value on their reservations, federal law may also preempt state taxation of non-Indians engaged in Indian commerce. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (non-Indian engaged in reservation timber production with Indian tribe was exempt from state motor fuel taxation).

In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), for example, the Supreme Court held that non-Indian hunters using a tribal hunting enterprise on reservation lands were exempt from state hunting regulations. The Court explained the basis for its decision as follows:

The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. . . . The Tribal enterprise in this case clearly involves "value generated on the reservations by activities involving the Tribe."

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<sup>3</sup> Indeed, the States have often been hostile to tribal self-governance. United States v. Kagama, 118 U.S. 375 (1886); see also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

Id. at 340. Accordingly, the State had no authority to impose license requirements and fees on non-Indians utilizing the valuable hunting resources generated by the Tribe on its reservation.<sup>4</sup>

It is possible that some Indian tribes may raise tobacco, or engage in manufacture of Native American tobacco products. If so, tribal sales may be considered to be based on reservation value, and reservation sales of products based on such value to non-Indians would then be exempt from state taxation. Any legislation in this area should, consistent with the regulatory objectives of the statute, preserve that avenue of development for Indian tribes under the Indian self-determination policy.

#### **PROTECTION OF AMERICAN INDIAN RELIGIOUS USES OF TOBACCO**

For centuries, tobacco has been considered essential to the practice of American Indian religions as well as to the preservation of Native American culture and tribal identity. In order to protect this religious exercise from government interference, religious use of tobacco by members of federally recognized tribes should be exempted from any comprehensive tobacco legislation.

The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that

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<sup>4</sup> In contrast, where Indian tribes market prepackaged goods, without adding reservation value, non-Indian consumers may be required to pay non-discriminatory state sales taxes. Washington v. Colville, 447 U.S. 134 (1980) (prepackaged cigarettes).



it may do so without violating the Establishment Clause."<sup>5</sup> The accommodation doctrine permits the government to single out religion for special treatment under certain circumstances in order to lift a generally applicable regulation, such as tobacco regulation, that might burden the exercise of religion.

Further, the special government-to-government relationship between the federal government and federally recognized tribes permits Congress to enact legislation that recognizes and protects the unique aspects of Indian tribes.<sup>6</sup> Traditional tribal religious practices provide one such unique aspect of tribes. In light of this, the federal government may ensure that its actions serve to preserve rather than to destroy Indian religion and culture.

The special relationship between the United States and Indian tribes provides the underpinning of elements of a number of federal statutes, such as the American Indian Religious Freedom Act Amendments, 42 U.S.C. 1996a, National Historic

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<sup>5</sup> Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987)).

<sup>6</sup> Morton v. Mancari, 417 U.S. 535 (1974) (preferences for federally recognized Indian tribes are subject to less exacting scrutiny under the Equal Protection Clause than racial or ethnic preferences because of the historical and political relationship between tribes and the federal government). Two Courts of Appeals have extended Morton's logic to the Establishment Clause context. In Rupert v. Director, U.S. Fish and Wildlife Service, 957 F.2d 32 (1st Cir. 1992) (per curiam), the First Circuit upheld an exemption for federally recognized Indian tribes from the federal criminal prohibition on the possession of eagle feathers. The Fifth Circuit, in Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), similarly upheld exemptions for the Native American Church from federal and state laws prohibiting peyote possession.

Preservation Act, 16 U.S.C. 470, and the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001. These statutes, and others, recognize the singular characteristics of Native American culture and, therefore, contain provisions tailored to protect Native American cultural artifacts. A legislative exemption for the religious use of tobacco similarly recognizes some of the differentiating characteristics of Indian religion. The Department believes therefore that -- in addition to the accommodation doctrine -- the special relationship empowers Congress to protect the religious use of tobacco by members of federally recognized tribes.

Finally, the history of attempts by the United States to curtail Indian religious exercise provide an important justification for protecting Indian religious exercise from further incursion. The mandate to protect religious liberty is deeply rooted in this Nation's constitutional heritage. American Indian religions, regrettably, have not always benefitted from the First Amendment's protection of the exercise of religion. For example, from 1894 through the 1930's, the federal government banned "[t]he 'sun-dance' . . . and all other so-called feasts assimilating thereto," as well as "[t]he usual practices of so-called 'medicine men.'" Regulations of the Indian Office 106 (1894). Against this background, it is important to incorporate protections for American Indian religious uses of tobacco in order to prevent unintended infringement on American Indian freedom of religion.

Mr. Chairman, that concludes our preliminary views on the Indian provisions of the proposed tobacco settlement. At this time, I would be happy to respond to any questions that you may have.

2/10/98

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Tobacco - settlement -  
Indians



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To: elena kagan

cc:

Subject: Proposed OTJ Testimony

Gerg, James, Randy and Pam:

I got the hard copy of the revised testimony proposed by the Office of Tribal Justice. I am still concerned that the sections starting on page 2 through page 5 addressing specific provisions of the proposed "tobacco settlement." I believed these sections should be deleted.

These sections create the impression that the proposal put forth by the state Attorneys General is the template of the Administration's proposed tobacco legislation. It is not. The only template for the Administration's proposed comprehensive legislation are the five points that the President laid out. It is simply a mistake to comment on the specifics of a draft outline of a settlement between the tobacco companies and the state Attorneys General, which did not purport to be a legislative proposal, and is not going to serve as the draft for any legislation proposal.

Additionally, starting on page 2 we refer to the "proposed tobacco settlement" without specifying that we are referring to the draft proposed "resolution" offered by the state Attorneys General. The language "proposed tobacco settlement" can be easily confused to mean the proposal offered by the President but, of course, the President's proposal does not contain any of the provisions discussed in pages 2-5 of this testimony.

I know that Secretary Shalala in her testimony stayed away from discussing the state Attorneys General's proposal because the Administration does not want this debate to focus on that as being the template for legislation. They want to focus to be on the five points offered by the President. I think this objective is not served by the part of this testimony that focuses on the specific sections of the proposed resolution offered by the state Attorneys General.

--George

514-5713

cc: Mark Van Norman  
Thomas LeClaire  
Tony Sutin  
Donald Remy

tobacco settlement - indianus



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Record Type: Record

To: elena kagan

cc:

Subject: Indian tobacco provisions -Reply

Greg:

I would think the Administration would be opposed to having anyone testify about how specific provisions in the tobacco resolution proposed by the state Attorney Generals should be improved. Such comments imply that the Administration has accepted that proposal as the basis for legislation. The President rejected that approach and instead set out the five principles that should be the cornerstones of any legislation.

Additionally, he met with Congressional leaders this week and suggested that they work together to draft legislation that would meet his five objectives. The WH has been very careful not to address any specifics at this point. The concerns of the Tribal Justice office can be raised during the review of any legislation that emerges from the process the President has suggested for global tobacco legislation.

To provide specific comments on the proposal offered by the state Attorneys General would seem contrary to the tack the president is taking on this.

I have taken the liberty of faxing the proposed testimony to Elena Kagan who is Chief of Staff to Bruce Reed who heads up the Office of Domestic Policy in the White House. This will get to them quicker than it would through regular channels.

Thanks, George

cc: Elena Kagan

John Dwyer

James Castello

Tony Sutin

Mark Van Norman

Record Type: Record

To: elena kagan

CC:

**Subject: Indian tobacco provisions -Forwarded**

Elena:

Attached is the testimony that the Office of Tribal justice is proposing for clearance for a Congressional Hearing scheduled for October 9th. By an earlier e-mail to them, which I copied to you, I told them that I did not think the Administration would think it appropriate to be offering suggestions to the specific provisions of the resolution proposed by the state Attorney Generals.

I will also fax you the attached.

--George

Date: 10/03/1997 05:30 pm (Friday)

**Subject: Indian tobacco provisions**

Date: Friday, October 3, 1997 5:30 pm

From: SMO02(VANNORMA)

**Subject: Indian tobacco provisions**

Dear Greg,

Could you circulate this within the Department for clearance please? The Senate Committee on Indian Affairs requested Tom LeClaire to testify on these provisions on 10/8 at 9:30 a.m.

Thanks, Mark Van Norman

cc: John Dwyer, ASG

Tony Sutin, Prin. Deputy ASG

George Phillips, Civil

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Office and say that the  
attachment he sent me  
didn't come out in email.  
Ask them to fax it.

Also, let George know that even without seeing the proposed attachment, I did not think entirely agree with what he wrote to the Office of Tribal Justice.



Tobacco - settlement -  
Indians

**U.S. Department of Justice**  
Office of the Assistant Attorney General  
Civil Division

**George Jordan Phillips**  
Counselor to the Assistant Attorney General

950 Pennsylvania Ave., N.W., Room 3143  
Washington, D.C. 20530  
(202) 514-5713 Fax (202) 514-8071

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COMMENTS:

*The Office of Tribal Justice is testifying at a Congressional Hearing and is proposing the attached testimony. I told OLA that I did not think anyone should be testifying on the "Resolution" proposed by the State AG's, that the President has called for*

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*new legislation which may be quite different.*

*[Signature]*

TESTIMONY ON THE TRIBAL GOVERNMENT PROVISIONS  
OF PROPOSED TOBACCO SETTLEMENT  
Before the Senate Indian Affairs Committee  
October 8, 1997

Chairman Nighthorse Campbell, Vice Chairman Inouye, and Members of the Committee, good morning and thank you for inviting the Department of Justice to testify today. I am Thomas LeClaire, Director of the Office of Tribal Justice, Department of Justice.

At the outset, I should emphasize that I am here today to briefly discuss our preliminary views on the Indian provisions of the proposed tobacco settlement. The views expressed today are limited to those issues, and do not set forth an Administration policy position on the tobacco settlement as a whole.

GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES.

When working with Indian tribes it is important to bear in mind the fundamental principles that guide the Federal Government's relations with tribal governments.

The United States has a unique legal relationship with Indian tribes as set forth in the Constitution, treaties, statutes, court decisions, executive orders, and administrative action. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. And, in numerous treaties and statutes, our Nation has guaranteed the right of Indian tribes to the "highest and best" form of government -- self-government. Ex Parte Crow Dog, 109 U.S. 556, 568-69 (1883). Under our trust responsibility to protect Indian tribes, the United States should exercise the



utmost care concerning tribal government authority. See e.g., 25 U.S.C. § 3601(2) ("the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government"); see also 25 U.S.C. §§ 450, 1451, 1601, 2501-2502, 3701, and 4101.

The Administration and the Attorney General respect and honor the commitments of the United States to Indian tribes. Thus, both Congress and the Executive Branch have recognized the importance of working with Indian tribes on issues concerning tribal government, trust resources, and Indian treaty rights within the framework of government-to-government relations. Accordingly, we respectfully submit that Congress should develop tribal government provisions in any legislation in this area consistent with our government-to-government relations with Indian tribes and the status of Indian tribes as domestic dependent nations.

#### TREATMENT AS A STATE

The proposed tobacco settlement would afford Indian tribes treatment as a state, if certain conditions are met. In general, federal statutory "treatment as a state" for tribal governments appropriately recognizes the governmental status of Indian tribes, although at times special provisions are required to reflect the unique situation of tribal governments. We agree that any legislation in this area should provide treatment as a state for Indian tribes.

In the proposed tobacco settlement, certain provisions should be more carefully crafted to ensure consistency with the

government status of Indian tribes. In Appendix III, Section A(2), the proposed tobacco settlement would apply federal taxes on tobacco manufacture, distribution, or sale to any Indian tribe that engages in those activities to the same extent as the federal taxes apply to other persons. In any legislation on this subject, we believe that it would be preferable to have a general provision applying federal tobacco taxes to states that engage in such activities, and then under the treatment as a state provision, the general federal tobacco tax provision would apply to Indian tribes. Indian tribes should not be singled out for application of these federal taxes, if the taxes do not apply on the same basis to state governments.

Under Section (B)(2); in applying the treatment as a state provision the FDA would have to engage in factual determinations as to whether a particular Indian tribe carries out "substantial governmental powers and duties." In general, Congress has rejected the idea that there are classes of Indian tribes, and instead, has indicated that Indian tribes are governments to be treated as such. In its report on the Federally Recognized Indian Tribe List Act, 25 U.S.C. § 479a, the House Committee on Resources acknowledged that federal recognition of an Indian tribe is:

[a] formal political act[;] it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe, and its

members. Concomitantly, it institutionalizes the tribe's quasi-sovereign status, along with all the powers accompanying that status such as the power to tax, and to establish a separate judiciary.

H.R. Rep. 103-781, 103rd Cong., 2nd Sess. (1994) at 2; 1994 U.S.C.C.A.N. 3768, 3769. An exception to this general rule has been made, inter alia, under federal environmental laws providing for treatment as a state for Indian tribes where states themselves must show institutional capacity to enforce federal standards. Under the proposed tobacco settlement, however, the states are not required to demonstrate particular institutional capacity to license tobacco vendors. Accordingly, in any legislation on this subject we would recommend that Indian tribes should be presumed to have competence to perform the regulatory functions. In particular circumstances, if the FDA finds that an Indian tribe does not have such institutional capacity, the FDA (or, perhaps the Department of the Interior, see 18 U.S.C. § 1161 (liquor regulation)) should have authority to regulate tobacco for that Indian tribe.

The proposed tobacco settlement would also allow the FDA to delegate its authority over Indian country to states, without any requirement of prior tribal consent. We believe that the FDA should not delegate its authority over Indian country to the states without tribal consent. As President Johnson said in regard to the 1968 Indian Civil Rights Act amendments to Public Law 280:

Fairness and basic democratic principles require that Indians on the affected lands have a voice in deciding

whether a State will assume legal jurisdiction on their land.

I urge the Congress to enact legislation that would provide for tribal consent before such extensions of jurisdiction take place.

114

Section (B) (2) of the proposed tobacco settlement acknowledges tribal government authority only with regard to trust lands. Under existing law, Indian tribes as domestic dependent nations possess government authority over their members and their territory. Thus, Indian tribes may regulate business activity on lands owned by Indians as well as business activity involving the Indian tribe or tribal members within Indian country. Kerr McGee v. Navajo Tribe, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); cf. United States v. Montana, 450 U.S. 544, 565-566 (1980). As the Supreme Court explained in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987), "'Indian country,' as defined as 18 U.S.C. § 1151, includes 'all land within the limits of any Indian reservation. . . .' This definition applies to questions

of both criminal and civil jurisdiction." Any legislation in this area should use the Indian country definition set forth at 18 U.S.C. § 1151.

#### RESERVATION GENERATED VALUE

Based on the United States' recognition of tribal rights to self-government, Indian tribes and reservation Indians generally are exempt from state regulation and taxation in Indian country. See e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (regulation); Moe v. Salish & Kootenai, 425 U.S. 463 (1974) (taxation). In addition, when Indian tribes and Indians generate value on their reservations, federal law may also preempt state taxation of non-Indians engaged in Indian commerce. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (non-Indian engaged in reservation timber production with Indian tribe was exempt from state motor fuel taxation). In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), for example, the Supreme Court held that non-Indian hunters using a tribal hunting enterprise on reservation lands were exempt from state hunting regulations. The Court explained the basis for its decision as follows:

The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. . . . The Tribal enterprise in this case clearly involves "value generated on the reservations by activities involving the Tribe."

Id. at 340. Accordingly, the State had no authority to impose license requirements and fees on non-Indians utilizing the

valuable hunting resources generated by the Tribe on its reservation.

It is possible that some Indian tribes may raise tobacco, or engage in manufacture of Native American tobacco products. If so, tribal sales may be considered to be based on reservation value, and reservation sales of products based on such value to non-Indians would then be exempt from state taxation. Any legislation in this area should, consistent with the regulatory objectives of the statute, preserve that avenue of development for Indian tribes consistent with the Indian self-determination policy.

Mr. Chairman, that concludes our preliminary views on the Indian provisions of the proposed tobacco settlement. I would be happy to respond to any questions that you may have.